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No. 90-1139

In The

Supreme Court of the United States

October Term, 1990

STEVEN BENNETT,

Petitioner,

vs.

STATE OF TENNESSEE,

Respondent.

Petition For Writ Of Certiorari To The Court Of Criminal Appeals Of Tennessee

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Tennessee violates the due process and equal protection clauses of the Constitution by permitting private counsel to assist in criminal prosecutions under the direction and control of public prosecutors.

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The respondent, the State of Tennessee, respectfully submits this response to the petition for writ of certiorari by the petitioner, Steven Bennett.

OPINION BELOW

The opinion of the Court of Criminal Appeals of Tennessee is attached to the petition as an appendix and

has been published. *State v. Bennett*, 798 S.W.2d 783 (Tenn. Crim. App. 1990).

JURISDICTION

The judgment of the Court of Criminal Appeals of Tennessee was entered on June 7, 1990. On October 15, 1990, the Supreme Court of Tennessee denied the petitioner's application for permission to appeal.

The petitioner seeks to invoke the jurisdiction of this Court under 28 U.S.C. § 1257.

STATEMENT OF THE CASE

The petitioner, Steven Bennett, was convicted by a jury of murder in the second degree by use of a firearm. The trial court subsequently conducted a sentencing hearing and sentenced the petitioner to seventeen (17) years imprisonment.

The petitioner appealed to the Court of Criminal Appeals of Tennessee, which affirmed the conviction and sentence on June 7, 1990. The petitioner filed a timely application for permission to appeal, which was denied by the Supreme Court of Tennessee on October 15, 1990.

ARGUMENT

THE DUE PROCESS AND EQUAL PROTECTION PROVISIONS OF THE CONSTITUTION PERMIT PRIVATE COUNSEL TO PARTICIPATE IN CRIMINAL PROSECUTIONS UNDER THE DIRECTION AND CONTROL OF PUBLIC PROSECUTORS.

The petitioner asserts that Tenn. Code Ann. § 8-7-401 is facially invalid under the due process clause and violates equal protection as applied to the petitioner. The respondent submits that the statute is constitutional on its face and that the record fails to support the petitioner's contention that it was unconstitutionally applied in his case.

Tenn. Code Ann. § 8-7-401 provides as follows:

> A victim of crime or the family members of a victim of crime may employ private legal counsel to act as co-counsel with the district attorney general or his deputies in trying cases with the extent of participation of such privately-employed counsel being at the discretion of the district attorney general. The district attorney general or his deputy shall make the final and concluding argument. The privately-retained counsel shall immediately inform the district attorney general of his employment.

In the petitioner's trial, two private attorneys participated in the prosecution under the direction and control of Assistant District Attorney Steven Hawkins.

Before trial, the petitioner requested a stipulation regarding the control of the prosecution. The assistant district attorney refused to stipulate that any control had been relinquished and asserted that his office decided all issues regarding the case. The private attorneys who

assisted the prosecutor testified to this effect. This assistant district attorney affirmed on the record that his office made all decisions in a fair and non-prejudicial manner and expected to continue doing so throughout the trial. There has been no showing that the district attorney general would have handled the case any differently if the victim's family had made their wishes known personally or through others not involved in the prosecution.

There is no federal authority for the proposition that private participation in criminal prosecution is unconstitutional *per se*. This Court has approved the authority of federal courts to appoint private attorneys to prosecute criminal contempt actions, so long as private counsel is as disinterested as the public prosecutor. *Young v. U.S. ex rel. Vuiiton et Fils S.A.*, 481 U.S. 787, 804 (1987). Other federal courts have held that state laws providing for privately-retained counsel to assist prosecutors in criminal cases do not violate the defendant's constitutional rights. *See, e.g., Jones v. Richard*, 776 F.2d 1244 (4th Cir. 1985); *Stumbo v. Seabold*, 704 F.2d 910 (6th Cir. 1983); *Woods v. Linahan*, 648 F.2d 973 (5th Cir. 1983).

In *Stumbo, supra*, the Court upheld the Kentucky private prosecutors statute since it required the public prosecutor to retain control over the conduct of trial. 704 F.2d at 911. Absent evidence that the private prosecutor had ignored the interest of justice in favor of seeking a conviction, there is no *per se* constitutional violation. The Court reversed the conviction in that case, however, because the private prosecutor violated the standards of conduct required of all prosecutors. *Id.* at 911-12. In the instant case, private counsel conducted themselves in the manner required of all prosecutors.

When the proof shows that the prosecutors use their position for improper purposes, the resulting conviction may be set aside. In *Ganger v. Payton*, 379 F.2d 709 (4th Cir. 1967), a public prosecutor represented the petitioner's wife in a divorce action while prosecuting him for assaulting his wife. 379 F.2d at 711. The prosecutor retained control over the criminal case and offered to dismiss charges if the petitioner agreed to a favorable divorce settlement. The Fourth Circuit subsequently refused to extend *Ganger* to a case in which a private prosecutor also represented the victim's family in a civil action, since the petitioner failed to show that the attorneys used the prosecution to exact a more generous settlement of the civil action. *Jones, supra*, 776 F.2d at 1246. The financial interest in the civil action may have created a potential conflict of interest, but only actual conflicts of interest or misconduct warrants setting aside a criminal conviction.

This Court has exercised its supervisory power over the federal courts to insure that control over criminal prosecutions is maintained by a disinterested prosecutor. *Young, supra*. In *Young*, the attorney who had secured the injunction which the petitioner violated was entrusted with exclusive control over the subsequent criminal contempt prosecution. This Court held that counsel's interest in the original civil litigation created opportunities for conflicts to arise, but refused to bar private counsel's participation altogether. 481 U.S. at 807. In rejecting respondent's argument that private counsel may often be the most familiar with the allegedly contumacious conduct, this Court said:

> That familiarity may be put to use in assisting a disinterested prosecutor in pursuing the contempt action, but cannot justify permitting counsel for the private party to be in control of the prosecution.

481 U.S. at 806 fn. 17.

The exclusive control exercised by the private prosecutor further led this Court to reject harmless error analysis. The Court held:

> If this is the case, we cannot have confidence in a proceeding in which this officer plays the critical role of preparing and presenting the case for the defendant's guilt.

481 U.S. at 810-11. These statements suggest that disinterested control of public prosecutions adequately protects the defendant's interest in a fair trial. Nothing in *Young* suggests that private input or assistance to the disinterested prosecutor violates any right of the petitioner.

In *Young*, this Court avoided the necessity of reaching any constitutional issues by relying upon its supervisory authority. 481 U.S. at 809, fn. 21. In doing so, the Court noted the need for caution and the need for balancing the competing interests. *Id.* A criminal defendant's interest in receiving a fair trial is adequately protected when a disinterested prosecutor maintains control over the course of the prosecution. His interests are further protected by requiring private counsel to adhere to the same standard of conduct required of public prosecutors, including the avoidance of conflicts of interests. Tennessee's statutory

procedure therefore satisfies the supervisory requirements of *Young* since the public prosecutor maintains control of the criminal prosecution.

The petitioner has not shown that counsel had a conflict of interest. The petitioner is asking this Court to assume that counsel's employment by the victim's family required counsel to serve two masters. To the contrary, the family's interest in conviction was consistent with the State's interest in conviction. In the cases cited above, private counsel had professional duties regarding civil litigation which may have affected their judgment in criminal prosecutions. When an attorney pursues more than one legal objective, the resulting conflict of interest is apparent.

The source of counsel's compensation, standing alone, does not create this same conflict of interest. In criminal prosecutions, the private attorneys represent the State of Tennessee under the direction and control of the public prosecutor. The code of Professional Responsibility permits counsel to receive compensation from a person other than the client if the client consents after full disclosure. Counsel may not permit the person paying him to direct or regulate his professional judgment in providing legal services. A.B.A. Code of Professional Responsibility, DR 5-107. Although private counsel may be paid by the victim's family, the threat of professional discipline helps assure that private counsel will not be controlled by the family. In this case, however, the petitioner has not even shown that private counsel was paid. There is nothing in the record to refute the conclusion that the private attorneys volunteered their services to the victim's family.

The petitioner further asserts that Tennessee's procedure violates his right to equal protection. *Griffin v. Illinois*, 351 U.S. 12 (1956), prohibits the State from withholding procedural protection to a defendant simply because he cannot afford it. It has no application to the petitioner's complaint that an adverse party has greater resources. Carrying this argument to its logical extension, the equal protection clause would be violated any time a defendant is prosecuted by a governmental entity which has greater resources than the defendant.

Furthermore, the record fails to support the petitioner's claim of disparate treatment. The state court record does not reflect that the petitioner is a man of limited means. He comes before this Court with privately retained counsel and a printed petition.

The record does not support the petitioner's assertion that the victim's family was affluent. He asks this Court to draw that conclusion by claiming that only well-to-do Tennesseans could afford the luxury of hiring their own "private" prosecutors. Petition, p. 46 fn. 40. Since he failed to prove that counsel was hired, the suggested inference is based upon speculation from a silent record. Under the statute, private counsel may volunteer, or be paid by collective fundraising, or by interested groups such as victim's rights advocates, trade associations or community groups. The petitioner had an opportunity to prove these claims on the record, yet failed to do so.

In addition, a fair reading of the record suggests that the assistance of private counsel eased the considerable burden which the petitioner's case placed upon the local prosecutor. The petitioner was represented at trial by Mr.

Charles W. B. Fels, of Knoxville, whose reputation for outstanding advocacy has earned him national recognition. *Best Lawyers in America* (Woodward/White, Inc. 1991). Mr. Fels is a partner in a well-respected firm of five attorneys. *Tennessee Attorneys Directory*, p. B-42 (M. Lee Smith Publishers & Printer 1991). Counsel provided the petitioner a vigorous defense in which all of his legal rights were asserted and protected. Counsel's zealous pursuit of his client's defense generated a technical record of approximately 400 pages.

In contrast, the interests of the State were represented by a rural prosecutor's office with a criminal prosecution staff consisting of the district attorney general and three assistant district attorneys. *Tennessee Attorneys Directory, supra* at p. E-9. The assistant district attorney was assisted in this case by two attorneys who volunteered during a condolence call to the victim's grieving family shortly after the murder. The record does not show that these attorneys were paid for their assistance.

The facts of this case demonstrate that the petitioner received a fair trial. The victim was a seventeen-year-old boy who mistook the petitioner's wife for a friend or acquaintance who had played a Halloween prank upon him. The victim followed the petitioner's wife and children to the petitioner's home before discovering his mistake. The petitioner gave pursuit and located the victim's car in the neighborhood where the original chase began. The petitioner returned home, seized his .12 gauge shotgun and returned to the victim's home.

The victim was standing in his driveway when the petitioner approached him with the shotgun. As the victim backed away, the petitioner said, "This'll teach you," and struck the boy with his shotgun, leaving a tapered, wedge-shaped bruise on the left side of his neck. The blow stunned the boy, who fell against his car and asked the petitioner to leave him alone. Instead, the petitioner raised his shotgun and said, "If that didn't teach you, this will." He then discharged a single shot into the victim's mid-section.

The petitioner had ample opportunity to cool his passions during the time it took to go home, retrieve his shotgun and return to the victim's home. Instead of calling the police, the petitioner chose to assault and execute a helpless, retreating boy. It is a sad irony that the petitioner is now complaining of private vengeance and the family's desire to seek the punishment which they deem appropriate.

In view of the evidence, the petitioner's conviction of murder in the second degree establishes without question that the petitioner received a fair trial. The opportunity to cool off and the petitioner's statements during and preceding the murder would have supported a finding of premeditation. The overwhelming evidence that the killing was intentional precluded the jury from finding him guilty of anything less than murder in the second degree. There is nothing in the record to suggest that the jury was swayed by the family's grief or the participation of private counsel.

The evidence showed that the prosecution was controlled by the Office of the District Attorney General.

Only inference, not evidence, supports a contrary conclusion. Under these circumstances, the petitioner will be entitled to relief only if this Court is willing to hold that private assistance in criminal prosecutions is unconstitutional in any form or fashion. This Court has rejected such an extreme rule for the federal courts. *Young, supra.* Certainly, the due process and equal protection clauses of the Constitution do not impose a greater burden upon the states.

CONCLUSION

For these reasons, the State of Tennessee submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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